No. 305

IN THE

Supreme Court of the United States

October Term, 1967

SECURITIES AND EXCHANGE COMMISSION, *Petitioner*

v.

NEW ENGLAND ELECTRIC SYSTEM, ET AL., *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND PRESENT ORAL ARGUMENT AND BRIEF OF THE MUNICIPAL ELECTRIC ASSOCIATION OF MASSACHUSETTS

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND TO PRESENT ORAL ARGUMENT

The Municipal Electric Association of Massachusetts hereby respectfully moves for leave to file the annexed brief *amicus curiae* in this proceeding and to present oral argument.

The Municipal Electric Association of Massachusetts is an association formed by the boards and managers of thirty-nine of the forty municipal electrical utilities in Massachusetts. It was organized to promote the general welfare of member plants and to aid them in providing the lowest possible costs and the best possible service consistent with sound business principles. The Association's interest stems from the pendency before the Securities and Exchange Commission of two proceedings under Sections 6, 7, 9 and 10 of the Public Utility Holding Company Act,

in which authority is sought for the issuance of initial common stock by two nuclear electric generating corporations and the acquisition of such stock by certain sponsor electric utility companies and holding companies (*Vermont Yankee Nuclear Power Corporation,* SEC Docket No. 70-4435; *Maine Yankee Atomic Power Company,* SEC Docket No. 70-4419). These municipals have been denied an opportunity to participate in, or purchase bulk power from, the generating corporation and, therefore, seek to show in that proceeding that, absent an appropriate condition vindicating their rights, the applications must be denied under the standards of Section 10(b)(1) of the Act, because the denials are anti-competitive and restraints of trade, whether taken alone, or in connection with denial of access to other sources of low-cost bulk power.

There is a common issue in the instant Supreme Court proceeding and the pending nuclear generator proceedings before the SEC: the relative weight to be given by the SEC to the Act's theme of avoiding the evils of "restraint of free and independent competition" irrespective of whether it is applied to a divestiture or acquisition. (Section 1(b)(2), 15 U.S.C. § 79a(b)(2)).

The annexed brief contains a discussion of Federal Power Commission cases that have recognized the benefits of competition in the certification and merger of wholesale public utility systems. These decisions and opinions by an expert regulatory agency should be of assistance to the Court in dealing with this qualitative judgment. Accordingly, it is believed that the interests of the municipal parties in the *Vermont* and

Maine Yankee cases may be substantially affected by the ruling in the instant Supreme Court proceeding and they should, therefore, have opportunity to present their arguments herein as *amicus curiae.*

In the light of the importance of the outcome of this proceeding to the Association and its members, the Association also respectfully moves that it be allowed fifteen minutes of time for oral argument.

Respectfully submitted,

George Spiegel
Attorney for Municipal Electric Association of Massachusetts

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BRIEF OF THE MUNICIPAL ELECTRIC ASSOCIATION OF MASSACHUSETTS, AS AMICUS CURIAE

Preliminary Statement

When this Court, in *Securities & Exchange Commission* v. *New England Electric System,* 384 U.S. 176(1966), reversed the first decision of the court of appeals in this case, it recognized that the Public Utility Holding Company Act's phrase "without the loss of substantial economies" is not crystal clear but must be given "practical sense and application." One of the factors the Court's opinion stressed as bearing significantly on the application to be given the statute's phrase is the "theme of elimination of 'restraint of free and independent competition,'" which "runs throughout the Act."

The Massachusetts municipals believe that proper application of the Holding Company Act's pro-competition theme would be greatly aided by an examination of the decisions of the Federal Power Commission on the subject of inter-utility competition. It would seem reasonable, in evaluating the relative public-interest values of competition and common management, to consider the views of the federal agency whose members and staff are the experts on both natural-gas and electric-power utilities.

Argument

In a series of decisions and orders beginning at least as early as the 1947 order affirmed in *Panhandle Eastern Pipe Line Co.* v. *F.P.C.,* 169 F.2d 881 (1948), cert. denied, 335 U.S. 854 (1948), the Federal Power Commission has recognized the principle that competition has an important public-interest function even in a regulated public utility industry. In that case, the Commission authorized the Michigan-Wisconsin Pipe Line Company to construct and operate a natural-gas pipe line from Texas to the Great Lakes area, even though Panhandle Eastern Pipe Line Company was already operating just such a pipe line. The Commission summarized the advantages it saw in allowing Michigan-Wisconsin's entry, as follows:

> It will result in competition there, and will also make "available to the Michigan market an alternative service and supply of natural gas from the area of the largest gas reserves in the United States. That such an independent additional and reliable source of supply will be of great value to the area to be served and benefit public con-

venience and necessity admits of no doubt." 169 F.2d at 883.

Again, in *Transcontinental Gas Pipe Line Corp.*, 21 F.P.C. 138 (1959), wherein the Commission granted a certificate to Transco to sell gas to Lynchburg Gas Company as a second supplier, the Commission said (at page 404):

> We by no means intend to grant any company an exclusive right to serve a designated area, or to deny to consumers the benefits of more than one source of supply. Our objective is merely to protect the existing supplier from possible severe and unjustifiable harm resulting from the certification of an additional supplier, ...

The Commission's belief in competition as a useful tool in promoting efficiency and lower rates in public utility systems is forcefully expressed in four of its very recent opinions. In each of those opinions, the Commission has certified a second supplier of natural gas over the objection of the existing supplier and has found that the resulting competition will be beneficial to the public and so in the public interest. *Transcontinental Gas Pipe Line Corp.*, Opinion No. 493, June 8, 1966, 35 F.P.C. 917; *Columbia Gulf Transmission Co.*, Opinion No. 512, January 24, 1967; *City of Hamilton, Ohio*, Opinion No. 513, January 24, 1967; *Algonquin Gas Transmission Co.*, Opinion No. 522, June 27, 1967.

In the *Transco* case, Opinion No. 493, the Commission granted a certificate to Southern Natural Gas Company to serve part of the Chattanooga market, which previously had been served entirely by the existing supplier, East Tennessee Natural Gas Com-

pany. It is particularly significant that the Commission, in assessing the economic effect of establishing two suppliers for the market, gave consideration to the fact that:

> Southern's lower rates will permit Chattanooga [the distributor] to expand its sales and enable it to compete more effectively with alternative energy sources, particularly low-priced TVA *power*. (35 F.P.C. 917 at 914)

Here is clear recognition by the F.P.C. of the existence and importance of the very type of competition that would be made possible by the order entered by the Securities & Exchange Commission in the present case—competition between natural gas and electricity as alternative energy sources.

In the *Columbia Gulf* case, Opinion No. 512, a certificate was issued to Transco to supply part of the requirements of the Washington Gas Light Company, which previously had been served only by Atlantic Seaboard Corporation. The Commission acted over the strenuous objections of Atlantic Seaboard which, like the presiding examiner, considered that "Seaboard had fulfilled its public utility obligations to Washington, and that Transco's presence in Seaboard's market could be regarded as usurpation rather than competition for a market." (mimeo p. 4)

The Commission decision notes that, after Transco's competitive efforts were made, Seaboard introduced new rates "in order to permit the company to become more competitive." (mimeo p. 8) These lower rates were expected by the F.P.C. to increase sales and thus offset loss of sales. (mimeo pp. 8-9). "The Transco gas is cheaper and will produce substantial savings"

(mimeo p. 9), and "a pipe line has no vested interest in a market that must be perpetually protected by regulation." (mimeo p. 13) Although utilities may be "natural monopolies" the monopoly is not protected "where it is demonstrated that that competition would produce greater benefits to the public" (mimeo p. 13). Here "the potential competition afforded by Transco has already benefited the public interest and promises to do so even further in the future" (mimeo p. 14).

The effect of the FPC decision on natural gas rates in the Washington, D. C., area made newspaper headlines September 28 and 29, 1967, when the Washington Gas Light Company announced a resulting reduction in retail gas rates. As the Public Service Commission of the District of Columbia announced in its press release (Appendix A, hereto):

> These reductions in the Company's wholesale gas costs stem from recent Federal Power Commission proceedings involving pipeline gas rates and a new source of supply sought by the Company. As a result of those proceedings the Federal Power Commission approved new rates of Atlantic Seaboard Corporation which lowers the cost of gas to the local Company, and authorized the purchase by the Company of a part of its gas requirements from a new supplier, Transcontinental Gas Pipe Line Corporation. According to Chairman Avery, a substantial portion of the reduction in gas costs is attributable to the Company's success in obtaining the new source of supply, which the Public Service Commission had urged the FPC to authorize.

In the *City of Hamilton* case, Opinion No. 513, Texas Gas Transmission Company was certificated to supply part of the requirements of the City of Hamilton,

which previously had purchased its gas exclusively from Cincinnati Gas & Electric Company. The Commission commented:

> A natural gas company does not have a permanently fixed or vested interest in its existing markets. It should not be immunized from the forces of competitive operation within the natural gas industry. If the overall public interest will be better served by permitting a competing company to supply an existing market it should be permitted to do so.

Perhaps the most forceful demonstration of the FPC's judgment that competition at the wholesale level can be usefully employed in the public interest to control public utility rates occurred in the *Algonquin* case, Opinion No. 522. Asked by Algonquin for authority to construct and operate a lateral natural gas pipeline to render additional peak-day service to Hartford Gas Company, the Commission, *on its own motion,* directed Tennessee Gas Transmission Company to show cause why it should not be ordered to install and operate a parallel pipeline. After assessing the savings that would result from Tennessee's lower rates and assuring itself that the Connecticut Public Utilities Commission would see that these savings are passed along to the consumer, the Commission ordered Tennessee to begin operations as an alternative source of supply. When the Commission's attention was called to the fact that it had once allocated separate exclusive territories in New England to Tennessee and Algonquin, the Commission replied that its earlier action

> . . . necessarily created a potential for competition between the two companies. A division of markets was essential in the early 1950's if two independent companies were to survive. Needless

> to say, they have survived and prospered to the point where they are now in a position of being able to compete for the growing New England consumer load. Indeed, one beneficial result of the division was to insure that there would exist in the future viable alternate sources of supply available to serve the distribution customers in the New England market area. The growth of gas consumption in Hartford's general service area has caused this potential to be realized. . . .
>
> In two recent decisions we have made clear "that a pipeline has no vested interest in a market that must be perpetually "protected by regulation." *Columbia Gulf Transmission Company,* Opinion No. 512 (issued January 24, 1967), at p. 13. "A monopoly . . . should not be automatically and consistently protected where it is demonstrated that competition would produce greater benefits to the public." *Ibid.* See also *City of Hamilton, Ohio,* Opinion No. 513 (issued January 24, 1967), at pp. 8-9.

Nor has the Commission been unaware that a result of its certificating a second supplier in order to obtain the benefits of competition might have an adverse detrimental effect upon the existing supplier. To the contrary, such a contention was vigorously pressed by the existing supplier in each of the above cases and the Commission expressly recognized it to be "incumbent upon the Commission in any evaluation of a proposal [to authorize a second supplier] to consider whether [the] economic advantages would tend to be outweighed by economic disadvantage to the customers of [the original suppliers] by the withdrawal of the [distributor's] load." *City of Hamilton, Ohio, supra,* (mimeo, p. 5). Continuing, the Commission noted (*ibid.*):

> In approaching this aspect of the proceeding, we begin with the basic premise that *Lynchburg*

> [*Lynchburg Gas Co.* v. *F.P.C.*, 336 F.2d 942 (D.C. Cir., 1964)] established the test for evaluating the nature and scope of injury to be sustained by the loss of a particular load. The rule of *Lynchburg,* as we interpret that decision, makes it clear that no useful purpose is served by discussing in general terms, a loss in revenues or a simple reduction in rate of growth unless these circumstances are translated, by a proper showing, into proof of substantial actual detriment to the customers of [the existing supplier]. It is only this latter showing of detriment which can then be weighed in the balance against the established advantages to [distributors'] consumers in determining the overall public interest.

The FPC takes a similar position in connection with electric utilities, although that question has come up less frequently because of differences between the Natural Gas Act and the Federal Power Act.

In *Commonwealth Edison Co.,* Opinion No. 507, 36 F.P.C. 927, the Commission, in deciding whether to approve the merger of two electric power systems, felt obligated to "consider what effect, if any, our approval of a proposed acquisition will have on the existing and future competitive situation in the electric utility industry. . . . There is a legitimate public interest in the degree of concentration of economic power in American industries and, notwithstanding the safeguard of regulation, even in the electric utility industry." Although the Commission did approve the merger before it, since it combined companies "not in direct competition with each other," the Commission declared that "the general body of antitrust law is relevant to our considerations."

The FPC has thus found factually in case study after case study that regulation of monopoly is not an adequate substitute for competition. The Commission has found that the forces of competition benefit utilities as well as the public. Competition in the utility business need not be ruinous. On the contrary, it provides the motivation for rate reduction through cost reduction, and passes the benefits of efficiency along to the public. It applies to competition between gas and electric service just as the FPC has found it applicable to competition between two gas utilities and between two electric utilities.

Regulation adds up costs to determine the rate to be charged the public, but it does little to limit costs. Competition forces efficiency and cost reduction, ultimately lowering rates. Electric rates in New England are the highest in the country, and, we believe, a major cause is the lack of competitive incentive to reduce high costs and retire obsolete equipment.

Conclusion

Accordingly, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX A

PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA

FOR IMMEDIATE RELEASE

PRESS RELEASE

Area Residents Will Pay Less for Gas

Chairman George A. Avery of the Public Service Commission of the District of Columbia today announced a reduction of approximately $5,000,000 in charges to Washington Gas Light Company's 473,000 gas customers over the next 12 months. The reduction results from refunds and lower wholesale rates for gas purchased by the Company. About half of the $5,000,000 is applicable to past periods and will be reimbursed to customers in the form of reduced rates during the period October 1967 through September 1968. The remaining $2,500,000, Chairman Avery said, reflects lower wholesale supplier rates which also will be passed along to customers in the Metropolitan area in the form of further reductions in rates beginning in October 1967.

These reductions in the Company's wholesale gas costs stem from recent Federal Power Commission proceedings involving pipeline gas rates and a new source of supply sought by the Company. As a result of those proceedings the Federal Power Commission approved new rates of Atlantic Seaboard Corporation which lowers the cost of gas to the local Company, and authorized the purchase by the Company of a part of its gas requirements from a new supplier, Transcontinental Gas Pipe Line Corporation. According to Chairman Avery, a substantial portion of the reduction in gas costs is attributable to the Company's success in obtaining the new source of supply, which the Public Service Commission had urged the FPC to authorize.

The Company estimates that charges to a typical residential customer who heats with gas will be reduced by about $9.00 over the next 12 months. The reduction to residential non-heating customers will average about $1.80 over the same period.

September 27, 1967.